Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BOHEMIAN DISTRIBUTING COMPANY,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Does section 2 of the Twenty-first Amendment, which grants the States the right to control importation and sale of liquor and to structure its distribution, authorize California to enact and enforce a "primary source" law, *i.e.*, a law which prohibits a licensed importer from importing branded liquor into California unless authorized to do so by the owner of the brand?

2. Does California's primary source law, Assembly Bill 499, conflict with the Sherman Act, even though it does not require any person to engage in any conduct which would violate the Sherman Act?

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation, doing business as GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE, doing business as SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE, doing business as TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY, doing business as HOUSE OF FINE SPIRITS,

Petitioners,

vs.

BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondent.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation, and BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenors.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT .....

1. The Writ Should Issue To Correct An Error Of The California Court Which Denies Citizens Of California A Federal Constitutional Right To Adopt Legislation To Promote Competition Among Different Brands Of Liquor Sold In California 8

2. The Writ Should Issue To Correct The Ruling Below That The Sherman Act Is A Bar To California's Primary Source Law 12

CONCLUSION 15

APPENDIX A 1a

APPENDIX B 16a

APPENDIX C 17a

APPENDIX D 18a

APPENDIX E 19a

APPENDIX F 24a

APPENDIX G 26a

APPENDIX H 37a

TABLE OF AUTHORITIES

CASES	PAGE
Arizona State Liquor Board of Department of Liquor Licenses & Control v. Ali, 27 Ariz. App. 16, 550 P.2d 663 (1976)	8
Board of Trade v. United States, 246 U.S. 231 (1918)	14
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 7 (1980)	3,7,8, 9,10,11, 12
Colby Distributing Co., Inc. v. Lennen, 227 Kan. 179, 606 P.2d 102 (1980), *appeal dismissed sub nom. Grant-Billingsley Liquor Co., Inc. v. Lennen*, 49 U.S.L.W. 3331 (U.S. Nov. 4, 1980) (No. 80-189)	3,4,7, 10,
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	10-11, 13,14
Giozza v. Tiernan, 148 U.S. 657 (1893)	8
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	13
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, *reh. denied*, 384 U.S. 967 (1966)	8
Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980)	2,4,8, 10,13
Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d 431, 579 P.2d 476 (1978)	4,5,6, 7
State Board of Equalization v. Young's Market Co., 229 U.S. 59, *reh. denied*, 299 U.S. 623 (1936)	8
Tokaji v. State Board of Equalization, 20 Cal. App.2d 612, 67 P.2d 1082 (1937)	8

UNITED STATES CONSTITUTION	
U.S. Const. Amend. XXI § 2	2,3,4, 7,8,9, 10,11,12

CASES	PAGE
FEDERAL STATUTES	
Sherman Act, 15 U.S.C. § 1 *et seq.*	2,3,4, 5,7,10, 11,12,13, 14
STATE STATUTES	
Assembly Bill 499 (Stats. 1979, ch. 280, § 1); Cal. Bus. & Prof. Code § 23672 (West Supp. 1980)	2,4,5, 6,7,9, 11,12,13, 14
Cal. Bus. & Prof. Code § 23672 (West) (current version at Cal. Bus. & Prof. Code § 23672 (West Supp. 1980)	5
Cal. Bus. & Prof. Code § 23772	9
Cal. Bus. & Prof. Code § 24755 (repealed 1978)	5
D.C. Alco. Bev. Control Bd. Regs. tit. 3, ch. I, § 4.11	5
Kan. Stat. § 41-101 *et seq.*	2,4,10, 11,12
Mass. Gen. Laws. Ann. ch. 138, §§ 25B, 25C (West Supp. 1979)	5
12 Okla. Stat. tit. 37, § 501 *et seq.*	2,6,9
12 Okla. Stat. tit. 37, § 521, subd. (e)	6
Tex. Alco. Bev. Code Ann. tit. 3, § 37.10 (Vernon)	5
MISCELLANEOUS	**PAGE**
Letter from Jack B. Owens, Esq. to the Honorable Lewis F. Powell, Jr. (March 10, 1980)	9
Letter from Michael Rodak, Jr., Clerk, to Jack B. Owens, Esq. (March 21, 1980)	9
Wine and Spirits Wholesalers of America, Inc., 1976-1979 Cumulative Supplement to the Three-Tier System of Distribution in the Wine and Spirits Industry (November 1979)	5

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States: Your Petitioner, Bohemian Distributing Company, respectfully prays for a Writ of Certiorari to the Court of Appeal, Third Appellate District, of the State of California to review the judgment and opinion of that court entered on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980.

OPINIONS BELOW

The opinion of the Court of Appeal, Third Apellate District, of the State of California (Appendix A, *infra*) is

officially reported as *Norman Williams Co. v. Rice*, 108 Cal.App.3d 348, 166 Cal.Rptr. 563 (1980). The order of the Supreme Court of the State of California denying petitioner's timely petition for hearing has not yet been reported. A copy of this order is set forth in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeal, Third Appellate District, of the State of California was entered on July 17, 1980, granting the petition for writ of mandate. Thereafter, on September 24, 1980, the Supreme Court of California denied a petition for hearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Twenty-first Amendment (U.S. Const. Amend. XXI § 2) is set forth in Appendix C, *infra*. Pertinent portions of the Sherman Act (15 U.S.C. § 1 *et seq.*) are set forth in Appendix D, *infra*. Pertinent portions of the California Business and Professions Code, including Assembly Bill 499 (Stats.1979, ch. 280, § 1; Cal. Bus. & Prof. Code § 23672 (West Supp. 1980), are set forth in Appendix E, *infra*. Pertinent portions of the Oklahoma Statutes (12 Okla. Stat. tit. 37, § 501 *et seq.*) are set forth in Appendix F, *infra*. Pertinent portions of the Kansas Statutes (Kan. Stat. § 41-101 *et seq.*) are set forth in Appendix G, *infra*.

STATEMENT

This petition seeks review for the purpose of correcting significant errors made by the California Court of Appeal in *Norman Williams Co. v. Rice*, 108 Cal.App.3d 348, 166 Cal. Rptr. 563 (1980), wherein the court below held invalid California's "primary source law," which, like similar laws in 15 other states and the District of Columbia, regulates the class of

persons who may import branded liquor into the state.[1] The court below, purportedly relying upon this Court's recent decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), held that California's primary source law, enacted in 1979, conflicts with the Sherman Act (15 U.S.C. § 1 *et seq.*), and that said primary source law is preempted by federal law. This holding by the court below was erroneous. If this error is not corrected, citizens of California will be deprived of their rights under the Twenty-first Amendment to adopt legislation regulating liquor and fostering competition among different brands of liquor sold in California.

Petitioner Bohemian Distributing Company ("Bohemian"),[2] an intervenor in the proceeding below, here prays that its petition be granted, and that the decision below be reversed, based upon two cases decided by this Court within the past year. The first case, *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (hereafter referred to as *"Midcal"*), decided prior to the case below, affirmed the California Court of Appeal's holding to the effect that a state may not require price-fixing conduct of merchants in interstate commerce. As shown herein, *Midcal* nonetheless reserves to the states their Twenty-first Amendment right to maintain virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system within the state. The second relevant decision of this Court is *Colby Distributing Co., Inc. v. Lennen*, 227 Kan. 179, 606 P.2d 102 (1980), *appeal dismissed sub nom. Grant-Billingsley Liquor Co. v. Lennen*, 49 U.S.L.W. 3331 (U.S. Nov. 4, 1980) (No. 80-189) (hereafter referred to as *"Grant-Billingsley"*). The *Grant-Billingsley* case was decided subsequent to *Midcal* and the case below.

In *Grant-Billingsley*, appellants sought to overturn a Kansas Supreme Court decision, decided prior to the decisions in *Midcal* and in the case below. The Kansas Supreme Court

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[1] The primary source laws of other states and the District of Columbia are cited in Appendix H, *infra*.

[2] Petitioner is a licensed importer and wholesaler of distilled spirits in California.

had *upheld* a statute imposing extensive control over intra-brand competition, in addition to a primary source requirement like the one in California. (The Kansas legislation is set forth in Appendix F, *infra.*) Kansas, prior to the enactment of the legislation challenged in the state court, had been an "open wholesaling" state. The statutory change to a primary source scheme was expressly enacted to *introduce* competition into the state. See discussion in *Colby Distributing Co., Inc. v. Lennen,* 227 Kan. at 187, 606 P.2d at 103-104. The Kansas Supreme Court recognized the state's authority to regulate the importation and distribution of liquor pursuant to the Twenty-first Amendment and upheld the validity of the primary source statute.

As a result of this holding, an appeal was taken by certain Kansas liquor distributors arguing that those portions of the Kansas legislation which dealt with the distribution of liquor (e.g., those permitting exclusive territories) conflicted with the Sherman Act. In support of their appeal, these liquor distributors cited the California Court of Appeal's opinion in the case below, *Norman Williams Co. v. Rice,* which had been decided subsequent to the Kansas Supreme Court's decision, as authority for the proposition that there was a conflict between Kansas' primary source legislation and the Sherman Act, urging that, as a consequence, a substantial federal question was present. This Court summarily rejected appellants' argument, concluding that there was "no substantial federal question," and thus upholding the validity of the primary source legislation. Based upon the decisions in *Grant-Billingsley* and *Midcal,* there should be no dispute that the court below erroneously decided *Norman Williams Co. v. Rice* wherein California's primary source law was held to be invalid.

The pertinent facts as they relate to California's primary source law, Assembly Bill 499 ("A.B. 499"), Cal. Bus. & Prof. Code § 23672 (West Supp. 1980), are as follows: A.B. 499 was enacted by the California legislature in 1979 to resolve an ambiguity in California law which resulted from the decision of the Supreme Court of California in *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431, 579 P.2d 476 (1978). That decision, which invalidated section 24755 of the California Business and Professions Code on the ground that the minimum

resale price scheme it imposed on the distribution of liquor in California was in conflict with the Sherman Act, created an ambiguity in the predecessor-statute of A.B. 499, section 23672 of the California Business and Professions Code, in that section 23672 specifically referred to section 24755.

While section 23672 merely delineated what classes of liquor licensees were authorized to function as importers of liquor into California, it defined an "authorized importer" to be any person designated by "the licensee who filed the minimum price schedule for such brand pursuant to Section 24755." Because section 24755 had been declared to be invalid, California's Department of Alcoholic Beverage Control claimed it could not enforce section 23672 following *Rice*, since it could not perform legislative functions and interpret who was an "authorized importer" pursuant to section 23672.

To resolve this issue and to restore its intention that only certain designated importers have the right to distribute liquor in California, the California legislature in 1979 adopted a new law, A.B. 499. A.B. 499 was patterned after similar "primary source" laws in at least 15 other states and the District of Columbia. The object of primary source laws—including those in Kansas and California—is to aid revenue collection, insure orderly marketing of liquor in the states where enacted and to promote competition between different brands of liquor by facilitating agreements between a distiller and its wholesalers whereby the wholesalers are allocated sales territories for a particular brand of liquor. Primary source laws thereby limit the privilege to import a brand of alcoholic beverage to the owner of the brand or to those who have been designated by the owner of the brand.[3]

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[3] Primary source laws are not related to resale price maintenance laws. Some jurisdictions, such as the District of Columbia (D.C. Alco. Bev. Control Bd., tit. 3, Ch. 1 § 4.11) and Texas (Tex. Alco. Bev. Code Ann. § 37.10 (Vernon)), have long had primary source laws and no price control laws. Other jurisdictions, such as Massachusetts (Mass. Gen. Ann. Laws. ch. 138, §§ 25B, 25C (West Supp. 1979)), had resale price maintenance laws, but no primary source laws. A comparison of primary source laws and price maintenance laws is set forth in tabular form in Wine and Spirits Wholesalers of America, Inc., 1976-1979 Cumulative Supplement to The Three-Tier System of Distribution in the Wine and Spirits Industry (November 1979).

The 1979 California primary source law, A.B. 499, provides as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

The instant case arose in the court below because following the *Rice* decision in 1978 and before the passage of A.B. 499 in 1979, certain persons, including the petitioners below (hereinafter sometimes referred to as "Norman Williams Company"), took advantage of the California Department of Alcoholic Beverage Control's refusal after the striking of section 24755 to give meaning to the term "authorized importer" set forth in the predecessor of A.B. 499. Simply stated, these persons, including petitioners, began following the decision in *Rice* to purchase in Oklahoma and to import into California brands of liquor which they had not been authorized to import into California under the statutory scheme which pre-dated the *Rice* decision. Norman Williams Company was thus able to acquire branded liquor from Oklahoma, without regard to the vertical allocation of sales territories in California by brand owners, because Oklahoma was one of the two "open wholesaling" states whose law provides that any distiller who chooses to sell distilled spirits in Oklahoma must sell to all licensed Oklahoma wholesalers. (12 Okla. Stat, tit. 37, § 501 *et seq.*) Moreover, Oklahoma law also allows licensed wholesalers to sell distilled spirits *out of* Oklahoma to "qualified persons." (12 Okla. Stat. tit. 37, § 521, subd. (e)) Thus, any distiller who wished to sell in Oklahoma could not enter into an enforceable agreement with its Oklahoma wholesalers whereby the wholesalers would resell only in Oklahoma. As a result, liquor sold for delivery in Oklahoma could be and was redirected or reshipped for sale in California.

By its enactment of A.B. 499, California's legislature intended to nullify the extraordinary extraterritorial impact that Oklahoma law had inadvertently effected in California by virtue of the *Rice* decision and the actions of California's Department of Alcoholic Beverage Control.

As January 1, 1980, the effective date of A.B. 499, approached, Norman Williams Company brought suit in the California courts to enjoin the enforcement of A.B. 499, alleging, among other things, that A.B. 499 conflicted with and was preempted by the Sherman Act. As shown above, despite the fact that A.B. 499 is totally different from the resale price maintenance statute (section 24755) addressed by *Rice*, the court below enjoined the enforcement of A.B. 499.

By enjoining enforcement of A.B. 499, the court below deprived California of the right to regulate liquor within its boundaries by protecting the effectiveness of the agreements between a distiller and its wholesalers which allocate territories for resale in California, a right reserved to the states by the Twenty-first Amendment and recognized by *Midcal*. If California cannot exercise the rights denied to it by the court below, an integral part of its authority under the Twenty-first Amendment will have been taken away. The same loss will ultimately be suffered by the 15 other states and the District of Columbia having primary source statutes. This Court can and should avoid such a result by issuing the requested writ here and by reversing the judgment below.

Moreover, as shown above, this case urgently requires review to resolve the dramatic conflict between the result below and the decision of this Court to dismiss, for want of a substantial federal question, the appeal in *Grant-Billingsley* where a similar primary source law was placed in issue as conflicting with the Sherman Act. Given the result in *Grant-Billingsley*, it would be entirely anomolous to permit the California Court of Appeal's erroneous application of federal law to stand. Yet, without the granting of the instant writ, this result would occur. To dismiss the appeal in *Grant-Billingsley* for lack of a substantial federal question while refusing to

review the contrary holding of the California court in *Norman Williams Co. v. Rice* would leave in doubt and disarray the regulatory systems and a vast number of commercial relationships in the fifteen other states and the District of Columbia which have similar primary source laws.

REASONS FOR GRANTING THE WRIT

1. The Writ Should Issue To Correct An Error Of The California Court Which Denies Citizens Of California A Federal Constitutional Right To Adopt Legislation To Promote Competition Among Different Brands of Liquor Sold In California.

The Twenty-first Amendment provides the states with virtually unfettered discretion to regulate liquor. This Court has made plain that "[c]onsideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.' " *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 41-42, *reh. denied*, 384 U.S. 967 (1966).

It has thus been the traditional view of this Court that the Twenty-first Amendment reserves in each state the power to prohibit entirely or limit and regulate the traffic in intoxicating liquors within the state. *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, *reh. denied*, 299 U.S. 623 (1936); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh. denied*, 384 U.S. 967 (1966). No one has an inherent right to engage in the sale of intoxicating liquors. *Arizona State Liquor Board of Department of Liquor Licenses & Control v. Ali*, 27 Ariz.App. 16, 550 P.2d 663 (1976); *Tokaji v. State Board of Equalization*, 20 Cal.App.2d 612, 67 P.2d 1082 (1937). It is a privilege granted by the licensing authority and subject to the state's police power. *Giozza v. Tiernan*, 148 U.S. 657 (1893).

These longstanding principles of law have recently been restated by this Court in *Midcal*. In *Midcal*, this Court, while

holding that a state may not require price-fixing conduct of liquor merchants in interstate commerce, left no doubt that "[t]he Twenty-first Amendment grants the states virtually complete control over whether to permit the importation or sale of liquor and how to structure the liquor distribution system." (*Id.* at 110)[4]

California exercises this authority by use of the three-tier scheme of liquor distribution system found in many states. The three tiers referred to are retailing, wholesaling (including importing) and manufacturing (*e.g.*, distilling). Under the scheme, a specific license is required for each such activity, and no one may hold a license to engage in activity at more than one tier. Cal. Bus. & Prof. Code § 23772 (West Supp. 1980).

The primary source law of California, A.B. 499, is, like that of Kansas and other states, a vital ingredient of the three-tier system, particularly in light of the substantial extraterritorial effect of the liquor law of Oklahoma. The Oklahoma law, as discussed, makes it possible for persons who have no California licenses of any kind to sell to California wholesalers liquor that was putatively ordered for shipment to Oklahoma. As a result, without the existence of a primary source law, no distiller can give meaningful assurance to its chosen California wholesalers that they alone will be its franchisees in California. In short, Oklahoma law would and does deny to California the right to have effective vertical allocation of wholesaling territories in liquor.

If California cannot, by its primary source law, restore to a brand owner the right to choose to whom it shall distribute and to enter into territorial allocations with its wholesalers, its rights under the Twenty-first Amendment will be drastically abridged.

The decision in *Midcal* demonstrates that in the absence of active state supervision, liquor laws requiring resale price maintenance which otherwise might violate the antitrust laws

[4] Counsel for *Midcal* asked the Court to change the above-quoted language. (Letter from Jack B. Owens, Esq., to the Honorable Lewis F. Powell, Jr. (March 10, 1980)) Mr. Owens' letter contended that the Court had not intended to reverse broad state powers to structure liquor distribution except where the states themselves engaged in the liquor business. The Court declined to make the suggested change. (Letter from Michael Rodak, Jr., Clerk, to Jack B. Owens, Esq. (March 21, 1980))

cannot continue in effect. Nontheless, it is also clear from *Midcal* and *Grant-Billingsley* that this Court did not intend to emasculate the Twenty-first Amendment where the state's exercise of its police power does not conflict with the Sherman Act and other antitrust laws.

Unlike resale price maintenance laws, primary source laws do not require conduct which might otherwise have violated the Sherman Act. Further, there is nothing in the nature of primary source laws, such as that in California, which shields any supplier, wholesaler or retailer within the three-tier system from accountability for conduct which violates the antitrust laws.

As shown above in *Grant-Billingsley*, the appellants sought to invalidate the Kansas primary source law, which the Kansas Supreme Court had *upheld* as authorized by the Twenty-first Amendment and as consistent with the Sherman Act. This Court dismissed the appeal, stating there was no substantial federal question, even though appellants urged that the holding of the California Court of Appeal in *Norman Williams Co. v. Rice*, to the effect that California's primary source law was preempted by the Sherman Act, required reversal of the Kansas Supreme Court's decision.

It is obvious from the Kansas Supreme Court's decision, when it is read with *Midcal*, that the court below misapplied federal law to California's primary source law. In essence, the holding of the court below announced the very rule which this Court expressly declined to make in *Midcal:* the court below held that even though California's primary source law did not on its face compel a ***per se*** violation of the antitrust laws, it nonetheless was an invalid exercise of the state's power to regulate liquor because of its potentially anti-competitive effects.

However, the court below wrongly concluded that primary source laws are anti-competitive. In this regard, this Court has recently recognized that interbrand competition is often fostered by certain vertically-imposed restraints on intrabrand competition, including the use of vertical allocations of territories. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36

(1977).[5] Similarly, in Kansas, one reason stated by its Supreme Court for unholding Kansas' primary source law was that it fostered interbrand competition. Primary source laws thus play a vital part in enhancing competition at the manufacturing and the wholesaling tiers. By fostering vigorous competition at these tiers, A.B. 499 helps preserve competition at the retail level, all to the ultimate benefit of the consuming public in California. It is an important element in structuring a competitive three-tier distribution system and is unquestionably within the scope of authority guaranteed California by the Twenty-first Amendment, as interpreted in *Midcal.* Accordingly, California's primary source law should be upheld and the judgment below reversed.

Midcal leaves no doubt that the Twenty-first Amendment grants the states virtually complete control over whether to permit the importation or sale of liquor and how to structure the liquor distribution system. Were the court below correct, every state regulation would run afoul of the Twenty-first Amendment. Thus, for example, each state law requiring the licensing of persons distributing liquor within the state would run afoul of the Sherman Act since those failing to obtain licenses could not distribute liquor, thereby preventing the maximum number

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[5] In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court observed that competition between different brands of the same product so substantially protects the interests of consumers that interbrand competition is the "primary concern of the antitrust laws." (*Id.* at 52 n. 19) Such interbrand competition, the Court emphasized, is often fostered by restraints on intrabrand competition, *including the use of vertical allocations of territories.* (*Id.* at 54-56) Without such vertical arrangements, it is difficult, often impossible, for a manufacturer to induce its wholesalers to bear the cost of furnishing special services to its customers because other wholesalers who do not offer the services and bear the costs will nonetheless reap the benefits, *i.e.*, will get a "free ride" on the efforts of others (*Id.* at 55)

Moreover, the Court continued, this vertical allocation of territory is especially important for small businessmen and new entrants for whom expensive, nationwide multi-media campaigns are wholly impractical. (*Id.* at 55-57) If small manufacturers and newcomers cannot offer local wholesalers incentives to promote, they simply cannot compete, and the market will be left to the established manufacturers of high-volume, fast-moving merchandise. Thus, to deny to all manufacturers the opportunity to offer exclusive or limited territories is not only to narrow the field of competition but to restrict the role of the small businessman and the new entrant as well.

of competitors in the marketplace. This is exactly the opposite of the rule announced by this Court in *Midcal,* and it is therefore respectfully submitted that the court below was plainly wrong in ignoring the Twenty-first Amendment.

The Kansas law, the California law and the primary source laws of fourteen other states and the District of Columbia all have the same object—to promote competition among sellers of different brands through vertical allocations of territories. Each state primary source statute derives its authority from the Twenty-first Amendment. If this Court does not grant the writ sought herein and correct the error of the California court, there will undoubtedly be litigation and perhaps conflicting results in the other fourteen states and the District of Columbia. This multiplicity of litigation will make effective and consistent state regulation difficult, introduce enormous uncertainties in business expectations and create widespread doubt as to effect of hundreds of contractual relations between distillers and wholesalers. Equally important, the citizens of the remaining states may well lose their federal constitutional right to benefit from interbrand competition by use of similar primary source laws.

The citizens of each state have the same federal constitutional rights as the citizens of each other state. The Court should not allow the citizens of any state to lose those rights by inaction here. If the Court grants the instant writ and takes action resulting in the reversal of the decision of the California Court of Appeal, the rights of the citizens of each state to implement primary source laws through their respective legislatures will be preserved. On the other hand, if this Court should conclude that California's Court of Appeal ruled correctly and that no state has a constitutional right to a primary source law, then that answer ought to be given once and for all, ending the uncertainty, doubt and litigation which will ensue if no writ issues herein.

2. The Writ Should Issue To Correct The Ruling Below That The Sherman Act Is A Bar To California's Primary Source Law.

As shown above, the California Court of Appeal held that the Sherman Act and A.B. 499 conflicted. The court below essentially employed the following reasoning: (1) The Sherman

Act forbids restrictions on competition; (2) A.B. 499 gives a brand owner power to restrict competition between wholesalers of that brand; (3) therefore, A.B. 499 conflicts with the Sherman Act. *Norman Williams Co. v. Rice,* 108 Cal.App.3d 348, 355-358, 166 Cal.Rptr. 563, 568-570 (1980).

There are two critical flaws in this logic. Most important, even if it be assumed that some vertical allocations of territory made under the authority of A.B. 499 would violate the Sherman Act, nothing in A.B. 499 immunizes any such allocation from full scrutiny and sanction under the Sherman Act. *That is, A.B. 499 does not compel any brand owner and its wholesalers to agree to a restrictive allocation.* As discussed, this Court has made clear that a state law or other action does not immunize voluntary agreements from the Sherman Act. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 791, *reh. denied,* 423 U.S. 886 (1975). Therefore, whenever a brand owner chooses to allocate territories, that allocation will have to conform to the Sherman Act; if it unreasonably restrains trade, all the Sherman Act's sanctions and remedies will be available to government enforcement authorities and to private parties. In short, A.B. 499 cannot conflict with the Sherman Act because it simply does not require anyone to engage in any conduct which would otherwise violate the Sherman Act.

In addition, and equally important, the Sherman Act does not forbid *unreasonable* restrictions, and the vertical territorial allocation of sales territories is a classic example of a restraint which is forbidden only if unreasonable. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977). Yet there was no trial or fact-finding below concerning the reasonableness of the subject vertical allocations of territory. The California court simply ruled that A.B. 499 *on its face* violated the Sherman Act. Thus, as the court had no foundation for its conclusion that every vertical allocation of territory permitted under A.B. 499 for the liquor industry in California would necessarily violate the Sherman Act, this conclusion was unwarranted and unfounded. Even if A.B. 499 *required* vertical allocation of territories, it simply does not follow that, as a matter of law, such allocations would be unreasonable. Before any such determination could be made, a court would have to take

evidence as to the particular allocations that were required in order to determine reasonableness in accordance with the "rule of reason" enunciated in *Board of Trade v. United States,* 246 U.S. 231, 238 (1918), as recently reaffirmed in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49 n. 15 (1977).[6]

In sum, A.B. 499 does not require anyone to enter into any territorial allocations, let alone allocations that would violate the Sherman Act. Further, even if allocation arrangements were required, their consistency with the Sherman Act could not have been properly determined by the California Court of Appeal except by trial of the reasonableness issue. Accordingly, the conclusion by the California court that the Sherman Act operates as a bar to A.B. 499 was not only incorrect as a matter of law but also lacked any foundation in fact.

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[6] This analysis assumes, for purposes of argument only, that A.B. 499 was in excess of the authority delegated to California under the Twenty-first Amendment.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment of the Court of Appeal, Third Appellate District, of the State of California.

Respectfully submitted,

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